UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NEW YORK BRANCH OFFICE
DIVISION OF JUDGES

NBCUNIVERSAL MEDIA, LLC

and Case 02-CA-262640

NEWSGUILD OF NEW YORK,
LOCAL 31003, TNG/CWA

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for the General Counsel.
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for the Respondent.
Thomas Lamadrid, Esq., of New York, New York,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried remotely in a video hearing on December 21 and 22, 2020, pursuant to a complaint issued by Region 2 of the National Labor Relations Board (NLRB) on October 7, 2020.[1]

The complaint states that at all times since December 27, 2019, the NewsGuild of New York, Local 31003, TNG/CWA (Union or NewsGuild) has been the exclusive collective-bargaining representative of the following employees of NBCUniversal Media, LLC (Respondent), constituting a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time editorial employees employed by NBC News Digital to create editorial content for initial distribution on NBC News Digital platforms (currently nbcnews.com, TODAY.com, msnbc.com, NBC News Now, and Stay Tuned), including editors, reporters, producers, writers, production assistants, editorial designers, animators, and graphic artists.

The complaint alleges that on about March 2, 2020, Respondent implemented an annual–discretionary merit wage increase to certain unit employees pursuant to a longstanding past

[1] All dates are in 2020 unless otherwise noted.

practice and that about June 8, Respondent rescinded the merit wage increase it gave to certain unit employees (GC Exh. 1).[2] The complaint alleges that the Respondent rescinded the merit wage increase without prior notice to the union and without affording the union an opportunity to bargain over the rescission in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (Act). The complaint alleges that the rescission of the merit wage increase relates to wages, hours, and other terms and conditions of employment of the unit employees and is a mandatory subject for the purposes of collective bargaining (GC Exh. 1(8)(b-c) and (9)). The Respondent filed a timely answer denying the material allegations in the complaint (GC Exh. 1).

On the entire record, including my assessment of the witnesses' credibility[3] and my observations of their demeanor at the hearing and corroborating the same with the adduced evidence of record, and after considering the brief filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND UNION STATUS

The Respondent, a domestic corporation, with an office and place of business located at 30 Rockefeller Center, New York, New York, is engaged in the business of television production and the operation of a television broadcasting network. The Respondent derived gross revenues valued in excess of $100,000 and purchased and received at its New York facility, goods valued in excess of $5000 directly from points outside the State of New York. The Respondent admits in its answer to the complaint (GC Exh. 1(e)), and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

a. The wage increase and rescission in the merit planning process

The counsel for the General Counsel argues that the Respondent unilaterally rescinded on about June 8 the merit wage increase it gave to certain unit employees on about March 2 without first notifying the union and offer to bargain over the changes to good-faith impasse. It is maintained that the union became aware of the change only after being informed by the unit employees. At the time of this hearing, the parties have not reached a first collective-bargaining agreement.

On December 27, 2019, NLRB Region 2 certified the union as the exclusive collective-bargaining representative of the above unit employees (GC Exh. 2). Beverly Sloan (Sloan) testified that she became the union local representative of the unit employees in February and by a letter dated February 28, she informed Jason Laks (Laks), the senior vice president of labor

[2] The exhibits for the General Counsel are identified as "GC Exh." and the Respondent's exhibits are identified as "R. Exh." The posthearing brief of the General Counsel is identified as "GC Br." and the Respondent as "R. Br." The hearing transcript is referenced as "Tr."

[3] Witnesses testifying at the hearing included Beverly Sloan and Tate James.

relations for the Respondent, not to make any unilateral changes to the terms and conditions of employment to any of the unit employees without affording the union an opportunity to bargain over any unilateral changes. Sloan's letter expressly noted that any wage increase that would have normally occurred without the union (involvement) should be implemented by the Respondent in the normal course of business but must notify the union in advance of any changes so that the union may bargain over the changes (GC Exh. 3; Tr. 35, 36).

Laks responded to Sloan by email dated March 3, acknowledging her letter and that the Respondent is ". . . well apprised of what the status quo period necessitates as it relates to changes in terms and conditions of employment for covered employees. . . " but differs from the union ". . . as to the application and interpretation of relevant Board precedent." Laks noted that he believed Sloan was aware of his discussions with Ben Dictor (Dictor), the union's attorney, about informing the union prior to the implementation of the Respondent's standard annual merit planning process and that Dictor had no problem in its implementation (GC Exh. 4).

Sloan testified that she was aware of Laks' discussions and had received an email from Dictor on February 3 that included a string of emails between Dictor and Laks. Of note was an email dated January 17 between Dictor and Laks in which Dictor informed Laks that the union was agreeable for the Respondent to proceed ". . . with its annual evaluation and compensation changes as it would in the usual course of business" (GC Exh. 5 at p. 3). Dictor also asked Laks to inform the union of any changes in compensation following the annual reviews and to be provided with an updated list of unit employees reflecting the changes (Tr. 38–44; GC Exh. 5).

Sloan testified that the Respondent implemented on about March 2, a merit pay increase up to 3 percent of the employee's salary. Sloan said she was also aware that the Respondent subsequently rescinded the merit increase on May 5. Sloan was on a conference call on May 5 with Dictor, Laks, and Neil Mukhopadhyay (Mukho), who was the vice president of labor relations for the Respondent at the time. Sloan said that the conference call was requested by Mukho in an email dated the same day (Tr. 44–47; GC Exh. 6).

Sloan recalled Laks informing the conference participants that the CEO of NBCUniversal, Jeff Shell, had announced that the Respondent was rolling back the merit increases for employees making over $100,000 dollars. Laks stated that the rollback was not due to financial targets or because of financial exigency. The union subsequently received a copy of the unit employees impacted by the wage rollback (Tr. 48–51; GC Exhs. 7 and 8).

In an email on May 5 from CEO Jeff Shell (Shell) to the employees of NBCUniversal, he stated that the first quarter of 2020 was "quite strong" but the current environment (referring to the COVID-19 virus pandemic) had a significant impact on the company's performance. Shell mentioned the closure of the Respondent's theme parks, movie and other media productions and that across-the-board reductions were necessary. In addition to the voluntary reduction of 20 percent of salary for the senior leaders, Shell stated that the recent merit salary increases for exempt employees making more than $100,000 dollars would be rollback in early June (GC Exh. 19).

In a subsequent conference call, on May 13 initiated by Mukho, the union was informed again by Mukho that the merit pay rollback was a company-wide initiative. Dictor replied that the union was not inclined to consider economic concessions unless the Respondent was claiming economic exigency. Mukho stated that there were no financial targets. Dictor said the Respondent could not unilaterally rollback the merit increases when the parties are bargaining for a first contract. Laks said that was a "matter of perception." Dictor told Laks that it was a violation of the Act (Tr. 51–53).

In a May 18 email from Sloan to Mukho, Sloan wanted to know if the Respondent planned any layoffs and reminded him of the Respondent to bargain over any layoffs. Although the issue of layoffs is not part of this complaint, the email from Sloan did state and reaffirmed the belief that the Respondent must bargain over the reduction in pay (Tr. 54–56; GC Exh. 9).

In yet another conference call on May 22 among Sloan, Laks, Mukho, Dictor, and Tate James (bargaining committee representative), Laks reiterated that the rollback will be taking place company-wide and with other unions. Sloan related that Dictor said that didn't change his point of view. According to Sloan, Laks also stated that the entire merit process from the increase to the rescission was a discretionary process and made no offer to bargain over the wage rescission. Dictor responded that the rollback was not part of the discretionary process. Sloan recalled that Laks said it was unfortunate but the rollback will take place on June 8. Dictor again asked if there was a financial need for the rollback and Laks said no and that the Respondent was not claiming economic exigency (Tr. 57–60).

In a final email before the wage rollback dated June 2 from Sloan to Laks, Sloan again objected to the rollback. The email stated that the union will file a charge (with the NLRB) if the rollback was implemented (Tr. 66, 67; GC Exh. 12).

In response to the June 2 email, Laks replied on June 4 that the rollback is part of the company-wide merit planning process for all employees and the criteria had been applied consistently with all employees (GC Exh. 13). In particular, Laks noted that

> The company merit process itself is part of the status quo as we discussed with Ben before moving forward with having bargaining unit members participate in the merit review process. This decision, because it's part of that merit process, is therefore also part of and consistent with the status quo. Accordingly, the company is adhering to its obligations under the Act.
>
> As has been clear from the corporate-wide communications that have been shared regarding this initiative as well as our conversations with you, Ben, and Tate, this initiative is not motivated by or premised on any economic exigencies as that term is commonly understood in labor law. Rather, it is an attempt to achieve some cost savings through broadly administered criteria designed to have a minimal impact on as wide a population as possible.

Tate James (James) testified that he has worked as a video editor for the Respondent for the past 3 years and is on the bargaining committee when the union became the exclusive

bargaining representative in December 2019. James said he received a merit pay increase in March after a performance review from his supervisor. Due to the COVID-19 pandemic, the review was not conducted until June (as opposed to March). He was informed by his supervisor that he will receive a 3 percent increase. There was no mention of any wage rollback from his supervisor (Tr. 94–97; GC Exh. 17). James also testified that he had received a 3 percent merit increase in 2019. James believed he also received a 3 percent merit increase in 2018 but did not specifically remembered (Tr. 98–100; GC Exh. 18).

James testified he was present on the May 13 and 22 conference calls. James corroborated Sloan's testimony that Laks informed the union the rollback was a broader company-wide initiative and that it was part of the merit planning process. James did not recall if economic exigencies was mentioned for the rollback. On the May 22 conference call, James recalled that Mukho informed Dictor, Sloan and himself that the Respondent was moving ahead with the rollbacks. Dictor replied that it was doing so unilaterally and without the consent of the union. According to James, Dictor stated that the past annual merit planning process had always resulted in a wage increase and a rollback is against the status quo and not permissible without a claim of financial exigency (Tr. 102–107).

James also testified that he submitted a letter on behalf of the bargaining committee on June 3 to Chris Bernend, who was the executive vice president of News Digital at the time. His email to Bernend with the letter attached complained about the rollback of the merit pay increase without assent from the union and violated the status quo before the first contract had been ratified. Bernend responded on June 3 stating to James that the wage rollback was instituted across every division at NBCU and the criteria applied equally to all who participated in the merit pay process (Tr. 105–110; GC Exhs. 22, 23).

The merit wage increase was rolled back on June 8. In discussing the rollback with James, Sloan was informed by him that there has never been a rollback of the merit pay increase. The rollback affected 42 of 166 unit employees who were earning $100,000 dollars or more. Sloan testified that the merit pay increase was not restored by the Respondent (Tr. 69–73; GC Exh. 8).

In a June 12 email, James, as well as all employees affected by the rollback, was informed by a HR representative that the salary rollback became effective on June 8. James' salary statement indicated that his rollback was 2.9 percent with a monetary reduction of $3006.00 dollars (GC Exhs. 24 and 25).

b. The facts stipulated by the parties

During the hearing, the parties reached a stipulation of certain facts in the record that are not in dispute. The parties reached accord on those facts and agreed on the following stipulations (Jt. Exh. 1):

1. Respondent NBCUniversal Media, LLC is made up of, in part, numerous business units, including the NBC News Group. Some of those business units include subunits. News Digital is a subunit within the NBC News Group business unit.

2. Annually during the period January 1, 2015, through July 1, 2020, Respondent's nonsupervisory and nonmanagerial editorial employees in the News Digital subunit of the NBC News Group business unit participated in Respondent's annual merit planning process and received annual merit increases as determined by and at the discretion of managers and/or supervisors.

3. From January 1, 2015, through July 1, 2020, business units and/or subunits that implement the merit planning process for their respective employees receive a merit budget figure in the form of an overall target percentage increase from Respondent's corporate Compensation group which those business units and/or subunits rely on as part of the discretionary decision-making process referenced in Stipulation 6 below.

4. Respondent's corporate Compensation group designated a 3 percent merit budget figure each year for the merit planning process implemented annually during the period January 1, 2015, through July 1, 2020. That merit budget figure was designated by the corporate Compensation group for use on a company-wide basis. While the number has been a 3 percent target during each of the years in question, there is no requirement that it be 3 percent and the target number, which could be lower than 3 percent, is determined annually at the company corporate level.

5. From January 2015 through July 2020, neither News Digital nor the NBC News Group had a role in the determination of the budget figure referenced in Stipulations 3 and 4.

6. Part of the annual merit planning process referenced in Stipulation 2 involves a determination, at the discretion of the business unit or subunit that implements the merit planning process for its employees, of whether to grant a salary increase based on performance and, if so, how much. Not every employee that participates in the annual merit planning process is guaranteed a specific salary increase amount or any increase at all.

7. Annually during the period January 1, 2015, through July 1, 2020, News Digital utilized the merit budget figure determined by Respondent's corporate Compensation group.

8. Management of each business unit has discretion in how and whether any increases will be given to eligible employees within the business unit, including the discretion to give no increase at all to some eligible employees, so long as the total amount spent as part of the merit review process is aligned with the allocated budget figure referenced in Stipulations 3 and 4.

9. From January 1, 2015, through July 1, 2020, Respondent is not aware of any News Digital editorial employees that participated in the merit planning process that received no salary increase as part of that process. From January 1, 2015, through July 1, 2020, some News Digital editorial employees that participated in the merit planning process received salary increase of less than 3 percent.

10. The June 2020 rollback of the 2020 merit planning process salary increases as identified in General Counsel Exhibit 19 (May 5, 2020 Jeff Shell email) was part of a company-wide initiative determined at the corporate level which neither the NBC News Group nor News Digital had the ability to change.

11. During the period January 1, 2015, through July 1, 2020, Respondent is not aware of any corporate-wide determinations resulting in a rollback of any salary increases granted as part of the merit planning process other than the June 2020 rollback referenced in Stipulation 10.

DISCUSSION AND ANALYSIS

The General Counsel contends that Respondent violated 8(a) (5) and (1) of the Act when it unilaterally rescinded a merit pay increase without offering to bargain over the changes with the union (GC Br.). With regard to the rescission of the merit pay increase, the Respondent contends that it had a longstanding practice of engaging in an annual merit planning process that an employee would receive based upon an evaluation of performance and assessment of various factors, which included market and economic health of the company (R. Br).

a. The union did not waive its right to bargain over the merit pay rescission

As a threshold matter, I reject the Respondent's contention that the union had waived its right to bargain over the merit pay rescission. It is not disputed that the union was notified when the annual evaluation process began. Also not disputed is that the union did not demand to bargain over the merit planning process. The Respondent points to Dictor's January 17 email (GC Exh. 5) to Laks stating, in part,

> The NewsGuild is agreeable to having the Company proceed with its annual evaluation and compensation changes as it would in the usual course of business. It goes without saying that this is without prejudice to any proposal the Guild might make concerning wages or evaluations in the course of our negotiations for a first CBA.

Clearly, the understanding of the union was that the Respondent will exercise its discretion, as it has done so in past years, to begin the merit pay review process of its unit employees. The employees entitled to the pay increase and the monetary amount of the increase were within the discretion of the Respondent (Jt. Exh. at par. 8). Given this longstanding and consistent practice of awarding merit pay increases, there were no reasons for the union to request bargaining.

The issue to determine is whether the union waived its right to bargain over the rescission of the merit pay increase. It is certainly true that an employer's otherwise unlawful change will be deemed valid conduct where it is shown that the union has waived its right to bargain over this matter. However, it is equally true that "[n]ational labor policy disfavors waivers of statutory rights by a union" and thus, they are not to be "lightly inferred." *C&P Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982); *Georgia Power Co.*, 325 NLRB 420, 420 (1998).

Thus, while the obligation to bargain "may be waived by the Union either by the terms of a collective-bargaining agreement or by conduct . . . the waiver must be clear and unmistakable." *Harley-Davidson Motor Co.*, 366 NLRB No. 121, slip op. at 2 (2018) (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

In my opinion, I find that the union did not waive its right to bargain over the rescission of the merit pay increase. Dictor clearly stated in the same email above that any annual evaluation process did not take away the union's right to bargain any proposals the Respondent might make concerning wages or evaluations. Additionally, in Sloan's letter of February 28 to Laks, she reiterated that the union was placing the Respondent on notice to make no unilateral changes to the terms and conditions of any unit employees without a affording the union an opportunity to bargain over the decision and effects of such changes, including wages. With respect to wages, Sloan stated (GC Exh.3),

> We also demand that if there are any wage increases or benefit increases that would normally occurred with the union such increases should be implemented in the normal course of business; however, the Guild must be notified in advance of any such changes so that we may bargain over the changes.

Sloan (as well as Dictor in his email) specifically mentioned that wage increases occurring during the normal course of business should be implemented (without bargaining) but she cautioned the Respondent that the union must be notified in advance of any changes so that the parties may bargain over the changes. It is clear to me that any rescission in wages of unit employees would be a change from the normal course of business. I find that there was no clear and unmistakable waiver of the union's right to bargain when the wage change occurred in variance to the normal course of business operations of granting merit wage increases. *Harley-Davidson Motor Co.*, above.

I find that it is undisputed that the parties never bargained over the rescission of the merit pay increase once it was announced by CEO Shell on May 5. Dictor only gave his consent for the Respondent to effectuate and implement the merit pay increase to unit employees. Certainly, if the Respondent had informed the union of its intention to subsequently rescind the merit pay prior to May 5, it would be a folly on the part of the union not to demand bargaining as the exclusive bargaining representative of the unit employees. It is also undisputed that the union in fact demanded bargaining once it was informed by the Respondent in May of the merit pay rescission. Sloan credibly testified that the union made several attempts to bargain over the reduction in salary. She stated that the Respondent was not interested in bargaining over the rescission (Tr. 52–58; GC Exhs. 14–16).[4]

[4] I find that Sloan was credible when she described the back and forth discussions between Dictor and Laks. Sloan also took copious and contemporaneous notes of the telephone conference calls which fully corroborated her testimony as to the conversations between Dictor and Laks on May 5, 13, and 22 (GC Exhs. 14–16). I note that Laks was presented throughout the hearing and did not testify if indeed there were any contradictions in Sloan's testimony. Finally, the conversations described by Sloan were additionally corroborated by the testimony of James (Tr. 102–108).

b. The Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally rescinded the merit pay increases of the unit employees

Section 8(a)(5) of the Act requires an employer to provide its employees' representative with notice and an opportunity to bargain before instituting changes in any matter that constitutes a mandatory bargaining subject. *NLRB v. Katz*, 369 U.S. 736 (1962); *Toledo Blade Co*., 343 NLRB 385 (2004). Section 8(a)(5) and 8(d) define the duty to bargain collectively, which requires an employer "to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment." *Katz*, above at 742–743. A subject is considered a "mandatory" subject of bargaining when it is among the subjects described in Sec. 8(d) of the Act, which defines the duty to bargain collectively as encompassing "wages, hours, and other terms and conditions of employment." See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Thus, an employer may not change the terms and conditions of employment of represented employees, including salary increases or decreases, without providing their representative with prior notice and an opportunity to bargain over such changes. *Northwest Graphics, Inc.*, 342 NLRB 1288 (2004). A violation of Section 8(a)(5) does not require a finding of bad faith. *Katz,* above, at 743 and 747. Wages (increases or decreases) are a mandatory subject of bargaining. *Purple Communications*, 370 NLRB No. 26 (2020). A unilateral change in a mandatory subject of bargaining is unlawful only if it is a "material, substantial, and significant change." *Flambeau Airmold Corp*., 334 NLRB 165 (2001), quoting *Alamo Cement Co*., 281 NLRB 737, 738 (1986).

In my opinion, and I find, that the Respondent's reduction of wages up to 3 percent of employees' annual salary is a material, substantial, and significant change of terms and conditions of employment requiring bargaining with the union and violated Section 8(a)(5) and (1) of the Act. The remaining issue is whether bargaining was not required under the Act.

c. The rescission of the merit pay increase was not a continuing past practice

The Respondent contends that it is entitled to continue making unilateral changes to employee terms and conditions of employment that are consistent with an operational past practice and such unilateral actions are not subjected to statutory bargaining obligations because they do not represent changes in the status quo. Respondent contends it was not obligated to bargain over the rollback decision because the merit planning process was discretionary and the rollback was part of that process (R. Br. at 6).[5]

[5] The Respondent did not argue that its conduct was privileged by economic exigencies. *RBE Electronics of S.D.*, 320 NLRB 80 (1995). Although CEO Shell described in his letter of the economic downturn of Respondent's businesses and the loss of revenue, I find credible the testimony of Sloan and James regarding Laks' insistence that financial and economic conditions were not the reason for the rollback.

In *Raytheon Network Centric Systems*, 365 NLRB No. 161 at 17 (2017), the Board overruled *DuPont*[6] and reinstated *Shell Oil*[7] and *Westinghouse*[8] (as well as other cases) and held that an employer's past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past. *Raytheon,* above, slip op. at 16 ("[A]n employer's past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past."); Id., slip op. at 19 fn. 89 ("[U]nder *Katz*, an employer modification that is consistent with any regular and consistent past pattern of change is not a change in working conditions at all.")

The issue here is whether the employer's action amounted to a material change or the mere continuation of the status quo. To prove the latter, the evidence must show that: (1) the employer has an established past practice of the unilateral action at issue; and (2) the action at issue did not materially vary in kind or degree from that established past practice. The Board has held the burden of proof is on the party asserting the existence of a past practice. *Caterpillar Inc*, 355 NLRB 521, 522 (2010) (quoting *Sunoco, Inc*., 349 NLRB 240, 244 (2007)). To meet this burden, the party must show the prior action was similar in kind and degree and occurred with such regularity and frequency that employees could reasonably expect the practice to continue or recur on a regular and consistent basis. Id. See also *Consolidated Communication Holding, Inc*., 366 NLRB No. 152 (2018); *Hospital San Cristobal*, 358 NLRB 769, 772 (2012), reaffd. 363 NLRB No. 164 (2016); and *Ampersand Publishing, LLC*, 358 NLRB 1415, 1416 (2012), reaffd. 362 NLRB No. 26 (2015). In *Mike-Sell's Potato Chip Co.*, 368 NLRB No. 145 (2019), at 3, the Board stated ". . . the party asserting the existence of a past practice bears the burden of proving that the practice occurred with such regularity and frequency that employees could reasonable expect the practice to reoccur on a consistent basis."[9]

Applying *Raytheon* here, I find that the Respondent has failed to show that the merit pay rollback in May 2020 was consistent with a longstanding past practice. I agree that the annual merit planning process was a long-standing past practice (at least for the previous 5 consecutive years). However, I find that the merit pay rollback in June 2020 was a meaningful departure and varied significantly and materially from this past practice. As stated by the Board in *Mike-Sell's Potato Chips Co*., a past practice must show that it was ". . . frequent, recurrent and similar

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[6] *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016)

[7] In *Shell Oil*, the Board found the company's "frequently invoked practice of contracting out occasional maintenance work on a unilateral basis, while predicated upon observance and implementation of [the agreement], had also become an established employment practice and, as such, a term and condition of employment." 149 NLRB at 287 (1964).

[8] In *Westinghouse Electric Corp.*, which also involved subcontracting, the Board held there was "no departure from the norm in the letting out of the thousands of contracts to which the complaint is addressed. The making of such contracts was but a recurrent event in a familiar pattern comporting with [the employer's] usual method of conducting its manufacturing operations . . . It does not appear that the subcontracting engaged in during the period in question materially varied in kind or degree from that which had been customary in the past." 150 NLRB at 1576 (1965).

[9] The Board held in *Mike-Sell's Potato Chip, Co.,* above, that the sale of four delivery routes was consistent with the Respondent's 17-year past practice of unilaterally selling sales routes to independent distributors.

actions have been taken, for whatever reasons, such that employees would recognize an additional action as part of a "a familiar pattern comporting with the [r]espondent's usual method of conducting its manufacturing operations," above, slip op at 4., citing to *Westinghouse*, above, 150 NRB at 1576.

I find that the rollback in wages is materially different and not a similar action from the increase in wages that employees would recognize as a familiar pattern of Respondent's usual operations. A unilateral change is measured by the extent to which it departs from the existing terms and conditions affecting employees. *Crittenton Hospital*, 342 NLRB 686 (2004); *Southern California Edison Co*., 284 NLRB 1205 fn. 1. Here, the Respondent had consistently on an annual basis provided a merit pay evaluation process of its employees that may result up to 3 percent of the employee's yearly salary. The Respondent has a wide discretion to give a small or no increase to some unit employees (Jt. Exh. 1 at pars. 8 and 9). This had occurred for the past 5 years. Employees expected an annual pay increase based upon their performance. Employees also expected that the merit increase may be under 3 percent or that there would be no wage increase at all. But employees had no reasonable expectation that their merit wage increase would be taken away. As was stipulated by the parties, "During the period January 1, 2015, through July 1, 2020, Respondent is not aware of any corporate-wide determinations resulting in a rollback of any salary increases granted as part of the merit planning process other than the June 2020 rollback" (Jt. Exh. 1 at para. 11). Consequently, the wage rollback was not something unit employees would be familiar as part of the merit planning process when it was a clear departure from the existing past practice. The action in rescinding the wages by the Respondent simply cannot be viewed as a familiar pattern of the Respondent's usual operations.

I find that the rollback of the merit pay increase was not a frequent, recurrent event that employees would recognize as part of the familiar pattern in the merit pay evaluation process. *Mike-Sell's Potato Chip Co.*, above, slip op. at 4 ("To establish the existence of a past practice, it is enough to show that frequent, recurrent, and similar *actions* have been taken[.]") (emphasis in original). The Respondent has not shown that similar actions of rescinding a merit pay increase had taken place as a past practice.

Even assuming that the rollback of wages was part of a past practice, the Board in *Shell Oil,* above, also held that, even though the employer could continue its practice of unilateral subcontracting during the hiatus between contracts, the union retained its right to request bargaining over subcontracting, and the employer, though permitted to proceed with subcontracting unilaterally, was still required to bargain on request by the union. Thus, separate from the employer's right to engage in lawful subcontracting under *Katz*, any existing past practice did not eliminate the employer's duty to bargain upon request because the union had the right ". . . to propose a change in or elimination of the Company's practice and to request bargaining thereon." Id. 287–288. As I noted above, the union never relinquish or waived its right to bargain over the wage rollback. As such, when the union was made aware of the rollback of wages by May 5, it sought and demanded bargaining over the rollback on several occasions, but the Respondent refused to bargain.[10]

[10] Although not raised at the hearing, the counsel for the General Counsel argues in her posthearing brief that the Respondent had no intent to engage in meaningful bargaining over the wage rollback and

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Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally rescinded the merit pay increase that it had previously awarded to unit employees without first providing the union an opportunity to bargain over the change.

CONCLUSIONS OF LAW

1. The Respondent, NBCUniversal Media, LLC, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union, NewsGuild of New York, Local 31003, TNG/CWA, is a labor organization within the meaning of Section 2(5) of the Act.
3. At all material times, the Union has been the designated exclusive collective-bargaining representative of Respondent's employees, in the following appropriate unit:

> All full-time and regular part-time editorial employees employed by NBC News Digital to create editorial content for initial distribution on NBC News Digital platforms (currently nbcnews.com, TODAY.com, msnbc.com, NBC News Now, and Stay Tuned), including editors, reporters, producers, writers, production assistants, editorial designers, animators, and graphic artists.

4. By unilaterally implementing a wage rollback on about June 8, 2020, without bargaining with the Union to a lawful overall impasse in negotiations, the Respondent has violated Section 8(a)(5) and (1) of the Act.
5. The unfair labor practices, described above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent shall be required to make whole its employees for any earnings they suffered or expenses they incurred, including Social Security Administration (SSA) taxes, that resulted from Respondent's unlawful wage rollback. Any backpay amounts shall be computed in accordance with *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

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the decision to rescind the 2020 merit wage increases was a fait accompli (GC Br. at 14). A fait accompli situation arises when there is a fixed intent to make the change by a respondent that obviates the possibility of meaningful bargaining. *Aggregate industries,* 359 NLRB 1413 (2013). It is not necessary to address this argument herein simply because the finding of facts show that the Respondent never offered to bargain over the rollback. Since the Respondent made it clear to the union in May that it did not intend to bargain over the wage rollback, the action by the Respondent is a refusal and failure to bargain, rather than bargaining with no intention of changing its mind or in considering union bargaining proposals.

In accordance with *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), my recommended order requires Respondent to compensate the affected unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file with the Regional Director for Region 2 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ for New Jersey*, 363 NLRB No. 143 (2016). I would further recommend that the Respondent provide the Regional Director for Region 2 within 21 days, the affected employees' W-2 forms to address the possibility that the SSA may not accept Respondent's backpay reports without the accompanying W-2 forms to ensure that the allocation of backpay awards are accurately made to the appropriate calendar quarters.

Further, upon request of the union, rescind the unilaterally implemented wage rollback on affected unit employees and restore their merit pay increase.

ORDER

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended[11]

The Respondent, NBCUniversal Media, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally rescinding the merit pay increases of its affected unit employees.
(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

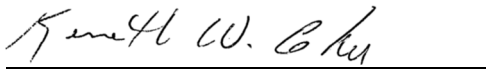
(a) Upon request of the union, rescind the unilaterally implemented wage rollback on about June 8, 2020, of the merit pay increase awarded to affected unit employees.
(b) Make all affected employees whole, with interest, in the manner set forth in the remedy section of this decision for any backpay they suffered or expenses they incurred as a result of the unlawful action by Respondent.
(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination, all payroll records, social security payment records, W-2 forms, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of reimbursement of costs incurred as a result of the unilateral rescission of the affected employees' merit pay increase under the terms of this Order.

[11] If no exceptions are filed as provided by Sec. 102.46 and if no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Within 14 days after service by the Region, post at its NBCUniversal Media office at 30 Rockefeller Center, New York, New York, where unit employees work, copies of the attached notice marked "Appendix A."[12] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 8, 2020.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. February 12, 2021



Kenneth W. Chu
Administrative Law Judge

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefits and protection
Choose not to engage in any of these protected activities.

WE WILL NOT change your terms and conditions of employment without first notifying the NewsGuild of New York, Local 31003, TNG/CWA (the Union), and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, before implementing any changes in wage, hours, or other terms and conditions of employment of our unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All full-time and regular part-time editorial employees employed by NBC News Digital to create editorial content for initial distribution on NBC News Digital platforms (currently nbcnews.com, TODAY.com, msnbc.com, NBC News Now, and Stay Tuned), including editors, reporters, producers, writers, production assistants, editorial designers, animators, and graphic artists.

WE WILL rescind the unilateral rescission of the merit pay increase on about June 8, 2020 and restore the merit wage increase of affected unit employees.

WE WILL make our unit employees whole for any loss of earnings and other benefits suffered as a result of our unilateral recission of your merit wage increase.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee

The NBCUniversal Media, LLC

_____
(Employer)

Dated:_____ By:_____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

National Labor Relations Board Region 2
26 Federal Plaza, Room 3614
New York, New York 10278
Hours of Operation: 8:30 a.m. to 5 p.m.
212-264-0300

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-262640 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0300.